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Before the
 FEDERAL COMMUNICATIONS COMMISSION
 Washington, DC 20554

In re Applications of)	MM Docket No. 88-400
Gonzales Broadcasting, Inc.)	File No. BPH-870707MJ
Bolton Broadcasting, Limited)	File No. BPH-870710MD
Voth Broadcasting Company)	File No. BPH-870710MF
Metropolitan Management Corporation)	File No. BPH-870710MY
Lorenzo Jelks)	File No. BPH-870710MZ
QRW Partners Limited Partnership)	File No. BPH-870710NF
Mableton Communications, Limited)	File No. BPH-870710NQ

For a Construction Permit for a
 New FM Broadcast Station on
 Channel 273A at Mableton, Georgia

To: The Commission

**MOTION FOR *NUNC PRO TUNC* REINSTATEMENT OF APPLICATION
 AND ISSUANCE OF ORDER IDENTIFYING BIDDERS**

Lorenzo Jelks ("Jelks"), acting in accordance with the Commission's First Report and Order in MM Docket No. 97-234, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, 13 FCC Rcd 15920 (August 18, 1998), *petitions for reconsideration pending* (hereinafter "*First Report and Order*"), hereby moves for (1) reinstatement *nunc pro tunc* of Jelks' application for a construction permit to build a new radio station in Mableton, Georgia, (2) issuance of an order under Paragraph 92 of the

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First Report and Order "identifying the eligible, qualified bidders entitled to participate in the auction" for Channel 273A at Mableton, Georgia (the "Mableton Channel"), 13 FCC Rcd at 15954, and (3) inclusion of Jelks on the list of eligible, qualified bidders entitled to participate in the auction for the Mableton Channel.¹ In support of the foregoing requests, the following is stated:

Background

1. Jelks was one of eighteen (18) parties who filed applications almost twelve years ago for the Mableton Channel. When Jelks filed his application on July 10, 1987, he answered the financial certification inquiry "no." In due course, the presiding Administrative Law Judge ("ALJ") enlarged the issues against Jelks to determine, *inter alia*, whether Jelks was financially qualified.² See *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 2474 (ALJ 1990). However, at hearing, the ALJ refused to accept Jelks' evidentiary proffer because it varied from the negative financial certification in Jelks' application. The ALJ therefore denied Jelks' application on the grounds that Jelks was not financially qualified. *Id.*, 5 FCC Rcd at 2496. The Review Board affirmed the ALJ's

¹ As explained *infra*, the Commission has the authority and obligation to grant this motion without regard to the pendency or disposition of the Petition for Writ of Certiorari which Jelks has filed with the United States Supreme Court. See *Crosthwait v. FCC*, 584 F.2d 550, 556 (D.C. Cir. 1978) (prior to the effectiveness of any final order, "the interests of administrative flexibility, and securing of the right result in the particular case, have relative dominance"). In the event the instant motion is granted, Jelks would seek dismissal of that petition.

² The financial issue was added by the ALJ because the Mass Media Bureau failed to designate the financial qualifications issue in the Hearing Designation Order. See *Mableton Broadcasting Company, Inc.*, 3 FCC Rcd 5357 (MMB 1988).

conclusion. *Mableton Broadcasting Company, Inc.*, 8 FCC Rcd 7609, 7615-16 (Rev. Bd. 1993).

2. The other remaining applicants subsequently entered into a settlement agreement which was contingent upon Commission affirmance of the Review Board's conclusion that Jelks was financially unqualified and that his application should be denied. The Commission approved the settlement agreement, vacated the findings and conclusions of the ALJ and the Review Board with respect to the applicants participating in the settlement agreement, and denied Jelks' application. *Gonzales Broadcasting, Inc.*, 12 FCC Rcd 12253, 12258-60 (1997).

3. On June 16, 1998, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission denial of Jelks' application in a *per curiam* opinion. *Jelks v. FCC*, 146 F.3d 878 (D.C. Cir. 1998). On October 20, 1998, the court denied Jelks' petition for rehearing and suggestion for rehearing *in banc*.

4. On January 19, 1999, Jelks filed a Petition for Writ of Certiorari with the United States Supreme Court. Accordingly, the denial of Jelks application is not final, and Jelks' application remains pending before the Commission. See 47 C.F.R. §1.65(a).

5. In the meantime, the Commission adopted the *First Report and Order* on August 6, 1998 to implement its new authority under Section 309(l) of the Communications Act, as amended (the "Act"), 47 U.S.C. §309(1), to conduct competitive bidding to resolve comparative licensing cases. The Commission concluded (a) that it would apply competitive bidding procedures to *all* pending initial licensing proceedings involving pre-July 1, 1997 applications without regard to their age or procedural status,

(b) that any consideration of an applicant's basic qualifications would be postponed until after an auction, and (c) that applicants would no longer be required to certify to their financial qualifications because "competitive bidding procedures provide adequate assurance that applicants will be financially qualified." 13 FCC Rcd at 15932-42, 15953-54, 15989.

6. In view of the foregoing conclusions, the *First Report and Order* stated that all applicants – even those whose applications had previously been denied or dismissed – would be eligible to participate in an auction as long as the denial or dismissal had not yet become final. Of course, the decision to reinstate previously dismissed or denied applications could mean – in cases where there was only one other applicant – that the remaining applicant would be deprived of a grant of its application and instead be subjected to an auction. The Commission nonetheless determined that that result would comport with the public interest:

At the outset we clarify that, where the Commission has denied or dismissed an application and such denial or dismissal has become final (*e.g.*, when an applicant failed to seek further administrative or judicial review of that ruling), such an entity is not entitled to participate in the auction. Among those remaining in the proceeding, we will permit all pending applicants to participate in the auction without regard to any unresolved hearing issues (or outstanding petitions to enlarge) as to the basic qualifications of a particular applicant. We will do so regardless of the number of remaining applicants or whether the adverse resolution of outstanding basic qualifying issues would eliminate all but one applicant.

13 FCC Rcd at 15952-53 (footnote omitted).

7. After the court of appeals had denied Jelks' petition for rehearing and suggestion for rehearing *in banc*, Jelks moved the court to remand the proceeding to the

Commission so that Jelks could participate in an auction of the Mableton Channel. The Commission opposed Jelks' motion. On December 3, 1998, the court denied Jelks' motion without opinion or explanation in a *per curiam* order.

8. After the court's action, the Commission issued an order which tried to clarify Paragraph 89 of the *First Report and Order*. *Heidi Damsky*, FCC 98-342 (January 6, 1999) (hereinafter "*Damsky Order*"). The *Damsky Order* involved reconsideration of a Commission order that (a) approved a settlement agreement between two applicants in a comparative proceeding and (b) affirmed an earlier decision that the third applicant (Heidi Damsky) was unqualified to be a Commission licensee. Damsky invoked Paragraph 89 of the *First Report and Order* and requested reconsideration so that (a) the permittee could be selected by competitive bidding and (b) Damsky could participate in the bidding.

9. The Commission denied Damsky's request because "¶89 was not addressing cases in which settlements were filed within the 180-day period" established by Congress in the new Section 309(1) of the Act. *Damsky Order* at ¶14. To hold otherwise, the Commission said, would "frustrate the intent of Congress as reflected in Section 309(1) . . . to afford applicants that had filed and litigated their applications under the old comparative system the opportunity to have their cases resolved without recourse to competitive bidding." *Damsky Order* at ¶12. Damsky has appealed the *Damsky Order* to the United States Court of Appeals for the District of Columbia Circuit. *Heidi Damsky v. Federal Communications Commission*, Case No. 99-1018.

Nunc Pro Tunc Relief Warranted for Jelks

10. It is well established that *nunc pro tunc* reinstatement of an application is appropriate when "there are exceptional public interest considerations which justify the relief requested, or when substantial equities in favor of the applicant are presented."

Mobile Telecommunications Corp., 49 RR 2d 1506, 1511-12 (1981). Reinstatement *nunc pro tunc* of Jelks' application is clearly warranted under the foregoing standard.

11. In the *First Report and Order*, the Commission abandoned its requirement that a broadcast applicant certify as to its financial qualifications. Jelks now finds himself in the anomalous situation of having had his application denied on the basis of a standard that the Commission explicitly repealed. It would clearly be unfair to Jelks – and inimical to the public interest – to preclude his participation in an auction because of an alleged failure to comply with a policy that is no longer deemed necessary. As the United States Court of Appeals for the District of Columbia once observed in a similar situation:

The Commission, in an intervening proceeding, has determined that the policy previously applied in cases like this one no longer serves the public interest, convenience, and necessity, and therefore will not be applied henceforth. We hold that in such circumstances an agency cannot be required to apply a policy it has rejected. Such a requirement would amount to a command to the agency to disregard its statutory mandate: it would have to employ a policy that, by its own determination, did not serve the public interest.

Washington Association for Television and Children v. FCC, 665 F.2d 1264, 1268

(D.C. Cir. 1981).

12. To be sure, the other applicants for the Mableton Channel will oppose Jelks' instant motion and complain that a grant of the motion would unnecessarily delay inauguration of service to the public. Any such delay, however, would be minimal since the

Commission will presumably conduct the auctions in the near future. Balanced against that minimal delay would be the considerable inequity visited upon Jelks: in effect, he would be penalized on the basis of a moribund policy for having failed to participate in a settlement. That penalty is particularly egregious since most of the other Mableton applicants suffered from defects, some of which reflect policies that have *not* been repealed:

Gonzales Application: The Review Board granted the application of Gonzales Broadcasting, Inc. even though the ALJ *twice* questioned the *bona fides* of the Gonzales application and found it a "sham." *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd at 2483-85, 2497-98, 7 FCC Rcd 4431, 4447 (ALJ 1992), 8 FCC Rcd at 7610-12, 7618.

Voth Application: The Review Board affirmed the ALJ's dismissal of the application of Voth Broadcasting Company for failure to prosecute the application. *Mableton Broadcasting Company, Inc.*, 8 FCC Rcd at 7613.

MMC Application: The Review Board affirmed the ALJ's conclusion that Metropolitan Management Corporation was not financially qualified. 8 FCC Rcd at 7613-15.

QRW Application: The Review Board affirmed the ALJ's conclusion that QRW Partners Limited Partnership was not financially qualified. 8 FCC Rcd at 7616-17.

MCL Application: The Review Board affirmed the ALJ's conclusion that Mableton Communications Limited was not financially qualified. 8 FCC Rcd at 7617-18.

13. Although the new Section 309(l) did reflect congressional interest in fostering settlements of pending comparative cases, that congressional purpose was directed towards *full* settlements that would not unfairly penalize certain applicants, like Jelks, who refused

to participate in a settlement.³ Stated another way, the failure or refusal of the Commission to list Jelks as a qualified bidder would penalize him simply because he was not a party to a private settlement agreement. That result is plainly at odds with the congressional directive that the Commission conduct auctions where no full settlement was reached during the 180-day window and that bidding rights be accorded to all persons having applications pending before the Commission on August 5, 1997 – the effective date of the Balanced Budget Act of 1997 and Section 309(1).

14. Nothing in the *Damsky Order* is inconsistent with the relief requested by Jelks. To begin with, the settlement agreement in *Heidi Damsky* was executed during the 180-day period established by Section 309(1); by contrast, the Mableton settlement agreement was executed approximately one year before the enactment of that new law. Equally important, all of the settling applicants in *Heidi Damsky* had been found to be basically qualified; by contrast, the Mableton settlement includes applicants who had been found basically unqualified.

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³ Even the Commission recognized that congressional purpose when it stated in the *First Report and Order* that auctions would be held even in situations where there was only one qualified applicant remaining. Jelks' situation is no different than that. The settlement in the Mableton proceeding resulted, in effect, in one other applicant who could participate in the bidding with Jelks.

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission reinstate Jelks' application *nunc pro tunc* and issue an order under Paragraph 92 of the *First Report and Order* that includes Jelks as an eligible, qualified bidder for the Mableton Channel.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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